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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

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The National Industrial Transportation League as *amicus curiae* submits this brief in support of the petitioners, Burlington Northern Railroad Company, *et al.* The League urges this Court to grant the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, No. 86-1666 (June 4, 1986). Consent to the filing of this Brief has been received from counsel for both the petitioner and the respondent. Letters granting consent have been filed with the Clerk of the Court.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The National Industrial Transportation League is an incorporated trade association whose membership includes approximately 1400 members, who are shippers and receivers of freight and users of railroad transportation services located throughout the United States. Such shippers and receivers of freight transported by railroad carriers are heavily dependent on the uninterrupted availability of railroad transportation service in interstate and foreign commerce.

The issues in this case involve the application of the sometimes conflicting policies underlying the Railway Labor Act and the Norris-LaGuardia Act to situations where employees involved in a major labor dispute with their employing railroad engage in secondary picketing of other railroads which may provide connecting services to the railroad engaged in the primary labor dispute. Such secondary picketing can take place on very short notice and can have very disruptive effects on all of the transportation services being provided by the railroad carriers not engaged or involved in the primary labor dispute.

The Court below held that the Norris-LaGuardia Act did not permit a federal court to enter an injunction against such secondary picketing, even where procedures established by the Railway Labor Act for the resolution of labor disputes in the railroad industry had not been followed between the employees engaged in the secondary picketing, and the railroads subject to such picketing. However, other United States Courts of Appeals have held that an injunction may be available to prevent such secondary picketing in such circumstances. The League and its members

believe it is essential for this Court to grant the petition for a writ of certiorari in order to resolve this important question of federal labor law.

ARGUMENT

This Court should grant the petition for a writ of certiorari in order to resolve an important question of federal labor law. The question closely divided several United States Courts of Appeals. The question to be resolved is whether the Norris-LaGuardia Act, 29 U.S.C. §§101-115, prevents Federal courts from enjoining employees of a railroad engaged in a major labor dispute with one railroad from engaging in picketing of other railroads not involved in the dispute which may provide connecting services to the railroad which is involved in the labor dispute. The explicit terms of the Railway Labor Act, 45 U.S.C. §§151-163, neither bar nor prohibit such "secondary" picketing, but, "in order to avoid any interruption of commerce," it does establish elaborate procedures which must be followed before employees may resort to self-help measures such as picketing to resolve a major dispute with a railroad employer. 45 U.S.C. §152, §§155-160, and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969).

The various Courts of Appeals have been unable to agree on a consistent view of how the Railway Labor Act should be interpreted so as to determine when, if at all, railroad employees must exhaust the dispute resolution procedures of the Act with respect to other employers in the railroad industry (who may have some direct or indirect connection with the primary employer), before they may engage in self-help meas-

ures against such employers. The courts below have also been unable to resolve consistently the related issue of whether the Norris-LaGuardia Act prevents federal courts from enjoining such secondary picketing.

This Court has established the principle that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enter injunctions to ensure compliance with the various mandates of the Railway Labor Act. *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 581-82 (1971) and cases there cited. But this Court has not clearly ruled on the question of whether the legislative policies embodied in the Railway Labor Act permit or prohibit secondary picketing, so as to enable the lower federal courts to enjoin such secondary picketing notwithstanding the provisions of the Norris-LaGuardia Act.

This is perhaps not surprising, because Congress has not specified in the Railway Labor Act what measures, if any, each side may or may not resort to when all of the elements in the detailed statutory framework for labor dispute resolution in the railroad industry have been tried and failed. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 377-380. In particular, Congress has neither prohibited nor authorized such secondary picketing in the Railway Labor Act. This fundamental dichotomy in the policies of the Railway Labor Act is placed in sharp focus by this case. On the one hand, the primary employees are seeking to exercise, after the dispute resolution procedures have been exhausted, one of the many techniques of economic self-help the Railway Labor Act at least implicitly allows, in order to apply indirect economic pressure through

other railroads on the primary employer in order to force resolution of the dispute. On the other hand, by picketing the secondary employer railroads, the primary employees are engaging in or causing a labor dispute with those employers, without following the same dispute resolution procedures of the Act already exhausted with the primary employer. This is inconsistent with the statutory objective of avoiding "any interruption to commerce," an objective of considerable importance to shippers such as members of the League.

Confronted before with the issue of secondary picketing under the Railway Labor Act, this Court, in view of the conflicting policies in the Act, contented itself with holding that the state courts could not become involved in determining the scope of lawful secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal, supra*, 394 U.S. at 392-393.[1] Some of the lower federal courts (including the court below in this case) have inferred that the Railway Labor Act allows any and all secondary activity without requiring exhaustion of the Act's dispute resolutions procedures before the activity may be utilized. See Pet. App. pp. 10a-19a. *See also Richmond, F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees*, No. 86-3544, slip op. (4th Cir. July 11, 1986), *Central Vermont Ry. Inc. v. Brotherhood of Maintenance of Way Employees*, No. 86-5245, slip op. at 7-11 (D.C. Cir. June 27, 1986) and *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Em-*

[1] The issue was also presented in *Atlantic Coast Line Railroad Co. v. Brotherhood of Railway Trainmen*, 385 U.S. 20 (1966), but an equally divided Court was unable to resolve it. *Cf. Trans World Airlines v. Hardison*, 432 U.S. 63, 73 n. 8 (1977).

ployees, 792 F.2d 303 (2nd Cir. 1986). However, other Courts of Appeals have accepted the notion that in certain circumstances the federal courts may determine what is allowable secondary activity under the Railway Labor Act. *Ashley, D. & N. Ry. Co. v. United Transportation Union*, 625 F.2d 1357, 1367-1369 (8th Cir. 1980); *In Re Brotherhood of Railway, Airline and Steamship Clerks*, 605 F.2d 1073, 1075 (8th Cir. 1979) and *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649, 655 (5th Cir. 1966).[2]

The question of whether and to what extent secondary activity may be engaged in by railroad employees after the primary dispute resolution procedures have been utilized is an important one this Court needs to resolve. The uncertainty among the lower courts on the questions has lessened the effectiveness of the Railway Labor Act in avoiding "any interruption to commerce." The petition for a writ certiorari should be granted to resolve this question.

This Court also needs to resolve the closely related question of whether secondary picketing by railroad employees may be enjoined by federal courts under the Norris-LaGuardia Act. The issue revolves around determining whether such secondary picketing is activity "involving or growing out of any labor dispute." Sections 1, 4 and 13 of the Act, 29 U.S.C. §101, §104 and §113. This Court has given a broad interpretation to the statutory definitions of a labor dispute. *Jacksonville Bulk Terminals v. Int'l Longshoreman's Ass'n*,

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[2] Affirmed by an equally divided Court, 385 U.S. 20 (1966). The Fifth Circuit's position would also be controlling precedent in the Eleventh Circuit. *Florida v. Royer*, 460 U.S. 491, 505 n. 10 (1983).

457 U.S. 702, 711-714 (1982). But the Court has also said:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40 (1957).

The lower federal courts, lacking any definitive guidance from this Court on whether injunctions against secondary picketing in the railroad industry were prohibited by the Norris-LaGuardia Act,[3] have arrived at divergent views of the matter. In the case previously before this Court, the Court of Appeals for the Fifth Circuit had held that a test based on a determination of the employees' economic self-interest should be applied in interpreting the statutory terms involved. *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., supra*, 362 F.2d at 653-655. This test has also been explicitly adopted by the Eighth Circuit in *Ashley D. & N. Ry. Co. v. United Transportation Union, supra*, 625 F.2d at 1362-64. The court below in this case, on the other hand, expressly rejected this test, and held that the literal terms of the Norris-LaGuardia Act removed federal court jurisdiction to enjoin such secondary picketing. Pet. App. pp. 19a-23a. *See also Richmond F. & P.*

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[3] *Supra* note 1.

R. Co. v. Brotherhood of Maintenance of Way Employees, *supra*, slip op. Part III; *Central Vermont Ry. Co. v. BMWE*, *supra*, slip op. at 3-7; and *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 305.

These divergent views on the scope of the Norris-LaGuardia Act have resulted in prolonged labor disputes in the railroad industry, and have caused unsettled labor conditions to the detriment of the free flow of commerce. The parties to present and future labor disputes need to have a uniform nationwide understanding of the role, if any, of injunction suits in regulating secondary picketing in the railroad industry. If that role is clear, then the parties to labor disputes will be able to formulate their strategies so as to allow the interplay of economic forces to provide the impetus for prompt resolution of such disputes. Such prompt resolution of railroad labor disputes would plainly be of substantial benefit to all users of the transportation services provided by the railroads and their employees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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